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NO. COA06-415

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v.

ADRAINE RAGI AUSTIN

Guilford County
No. 05 CRS 68745-47
05 CRS 68913

Appeal by defendant from judgments entered 12 October 2005 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 9 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Anne Goco Kirby, for the State.

J. Clark Fischer for defendant-appellant.

ELMORE, Judge.

Defendant Adraine Ragi Austin was charged with three counts of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. The State's evidence showed that on the night of 20 December 2004, Serge WaBeya was the cashier at the Kangaroo convenience store on Yanceyville Street. At approximately 9:00 p.m., Angela Bost was shopping in the store when defendant and another man entered the store. Defendant was wearing a black coat, jeans, and a toboggan on his head. Defendant walked towards the cashier's counter and the other man walked to the back of the

store. Defendant brandished a shotgun at WaBeya and demanded money from the cash register. WaBeya complied. Defendant walked around the counter, grabbed packs of cigarettes and told WaBeya to get down on the floor. Realizing that a robbery was taking place, Bost rushed to the front of the door to try to escape. Defendant told Bost that he would shoot her if she walked out and instructed her to stand in front of the cashier. Defendant then demanded Bost give him her purse. Bost relinquished her purse containing her checkbook which listed a cell phone number. Defendant then hit Bost on the head with the barrel of his shotgun, causing the shotgun to go off. Bost fell to the floor. Defendant and his accomplice fled the store with the money, cigarettes, and purse. WaBeya took Bost, who was bleeding from a laceration on her head, to the back of the store and called the police.

The next night, on 21 December 2004, Defendant entered the Kangaroo convenience store on Pleasant Garden Road and asked the cashier, Linda Kay Seger, for a box of Newport cigarettes. Defendant was wearing a blue jacket, jeans, tennis shoes, and a toboggan on his head. As Seger rang up the cigarettes on the register, defendant pulled out a gun and demanded that Seger give him money from the register. Seger voided the sale and opened the register drawer. Defendant then leaned across the counter, took the money out of the drawer and fled.

On 24 December 2004, four days after Bost was robbed, two calls were made to the cell phone number listed on Bost's checks. The cell phone revealed the callers' two phone numbers and one

voice mail message. The message was from a man who demanded that Bost give him the money she owed him and threatened to come get the money from her. Bost gave the callers' phone numbers to Detective Falls of the Greensboro Police Department. Detective Falls confirmed that one of the numbers belonged to defendant's sister-in-law, Jahdine Littlejohn, and the other number was the cell phone number of David Doggett, who had known defendant for about five years.

At trial, Littlejohn testified that defendant used her phone while he was at her residence on Christmas Eve. Littlejohn testified that the voice she heard on the audiotape of the voice mail message was defendant's voice. Doggett testified that defendant phoned him on the afternoon of 24 December 2004 and asked Doggett to drive him somewhere so that defendant could cash a check. Doggett picked up defendant at his sister-in-law's house and drove defendant to the store down the street. The store would not cash the check, so Doggett drove defendant to a nearby bank. Defendant was upset when he came out of the bank and said there were insufficient funds for the bank to cash the check. Defendant borrowed Doggett's cell phone to call the woman who allegedly wrote the check. Doggett testified that the voice on the voice mail was the message he heard defendant leaving the woman who allegedly owed money to defendant.

Detective Falls prepared a photo line-up of six suspects, including defendant. Both WaBeya and Seger identified the photo of defendant as looking most like the man who robbed them. Detective

Falls testified that when defendant was arrested and brought into custody, defendant was wearing a large black reversible coat "very similar to the ones that had been worn by the suspect in the robbery" and that Detective Falls confiscated the coat from defendant.

Defendant did not present any evidence. A jury found defendant guilty of three counts of robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to sixty-four to eighty-six months' imprisonment. Defendant appeals.

Before reaching the merits of defendant's appeal, we note that counsel failed to include a copy of the assault with a deadly weapon inflicting serious injury judgment in file number 05 CRS 68747. See N.C.R. App. P. 9(a)(3)(g). Counsel sent a copy of this judgment, but did not include an appropriate motion to amend the record on appeal. In our discretion, we allow the judgment to "be included or designated in the record" to facilitate proper appellate review. See *State v. Dayberry*, 131 N.C. App. 406, 408, 507 S.E.2d 587, 588 (1998); N.C.R. App. P. 2.

Defendant first contends that the trial court erred by allowing Detective Falls to testify about the large coat seized from defendant upon his arrest. During direct examination, the prosecutor questioned Detective Falls about interviewing defendant at the police department the day defendant was arrested. The following occurred:

Q. And when he came down to the Police Department did you have an occasion to see

him?

A. I did.

Q. Did he appear like he did today or is there any difference.

A. There was quite a bit of difference.

Q. What's the difference?

A. The clothing he had on, he had on a large jacket, black jacket, at the time. Very baggy jeans, and I don't recall the shirt he had on but the clothes he had on were much bigger and baggier.

. . .

Q. Okay. And you said he had a coat with him. Did you get a look at that coat?

A. I did.

Q. And what did you notice about that coat?

A. The coat was very very similar to the ones that had been worn by the suspect in the robbery.

Q. Did you take it from him?

A. I did.

Q. And what else did you notice about that coat?

A. I also noticed that after collecting the coat that it was a reversible type coat.

Q. What was on the outside of the coat? Or the one side he was wearing.

A. One side was a black coat. Was black in color and had a stripe along the bottom of the coat. On the reverse side it was a lighter blue coat that had several patches on the coat.

The prosecutor then asked Detective Falls about an evidence box as follows:

Q. What did you put in that box?

A. The jacket that was taken from Mr. Austin the night he was arrested.

Q. Okay. Could you open it up and see if that jacket is in there?

(Witness complied with request)

Q. That's the jacket you took from him.

A. Yes, it is.

Q. Can you show the jury the two sides of it?

A. Okay. This is the side that's got the darker - the black color with the strips along the bottom. The stripe. The blue stripe. And then when it's reversed, it has the blue and it has the patches on the back.

Q. Okay. I'll put it back in here.

MR. WOOD: Your Honor, I'd move to introduce State's Exhibit No. 18.

MR. LLOYD: No objection, Your Honor.

THE COURT: It will be admitted.

(STATE'S EXHIBIT NO. 18 RECEIVED INTO EVIDENCE)

Q. And why is it you collected that jacket?

A. That jacket appeared to be the same jacket that was ---

MR. LLOYD: Objection, Your Honor. That's a matter for the jury to decide.

THE COURT: Well, he can explain why he collected it. Obviously it will be for the jury to decide whether the evidence - what important it has, if any. Go ahead. You can answer.

A. The jacket appeared to be the same - same jacket that was used in both robberies. Just reversed it on one and then on the other.

Defendant asserts that the trial court erred in overruling his objection. Defendant argues that this testimony was irrelevant and improper opinion testimony because Detective Falls "had no personal knowledge at all regarding the particulars of either robbery." However, "[i]t is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979); see also *State v. McBryde*, 55 N.C. App. 473, 475, 285 S.E.2d 866, 867 (1982) ("By failing to object to the first question and answer eliciting this evidence, defendant waived his objection and right to assert its admission as grounds for a new trial."). Earlier in his direct testimony, the prosecutor asked Detective Falls what he noticed about defendant's coat and Detective Falls responded, "[t]he coat was very very similar to the ones that had been worn by the suspect in the robbery." This prior testimony from Detective Falls describing defendant's coat in terms of the coat worn in the robberies was admitted without objection. Accordingly, defendant's subsequent objection was waived. See *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003).

In addition, we note that at trial defendant objected to this evidence on the ground that it was "a matter for the jury to decide" while on appeal he argues that Detective Fall's testimony violated N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403, and 701. "[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between

courts in order to get a better mount in the Supreme Court.'" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Therefore, defendant's claim is also waived for this reason.

Defendant also contends that the trial court erred by denying his request to instruct the jury on testimony by interested parties. Defendant argues that both the investigating officers and the robbery victims "had a desire to see Defendant convicted, [and therefore], the interested witness instruction was appropriately raised from the evidence[.]" At trial, however, defendant argued that only the police officers "care[d] about the outcome[.]" Thus, defendant did not raise the issue of the robbery victims at trial and did not preserve this issue for appeal. "A party to a criminal case is not entitled to an instruction on witness credibility which focuses on law enforcement officers as a class." *State v. Hunt*, 345 N.C. 720, 726, 483 S.E.2d 417, 421 (1997). Furthermore, the trial court instructed the jury as follows:

Now, you are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, part, or none of what a witness has said on the witness stand. In deciding whether to believe a witness, you should apply the same tests of truthfulness that you apply in your everyday affairs. These tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he or she testified; the manner and appearance of the witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness; whether the testimony is reasonable and whether it is consistent with other believable evidence in the case.

(emphasis added). We conclude that the trial court's instruction regarding the witnesses' interest, bias or prejudice was sufficient and the trial court properly denied defendant's request to give an instruction on the testimony of an interested witness. Accordingly, this assignment of error is overruled.

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).